IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1008 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
RAFIQUE IBRAHIM SUMARA - Opponent(s)

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Appearance :
MR.H.L.JANI, ADDL. PUBLIC PROSECUTOR for Appellant(s) : 1,
NOTICE SERVED for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 26/10/2007

ORAL JUDGMENT

By way of this Appeal, the State has challenged the judgment and order passed by the learned Additional Sessions Judge, Porbandar acquitting the present respondent-accused for

the offence punishable under Section 363 read with Section 114 of the Indian Penal Code in Criminal Appeal No. 9 of 1992 setting aside the order of conviction and sentence passed by the learned J.M.F.C., Porbandar in Criminal Case No.5886 of 19991.

2. It is the case of the Prosecution that on 25th June, 1991, minor son of the complainant, Manish went to the school and from there, the present respondent and co-accused abducted and kidnapped him and from there in a train that boy was taken to Songadh T.B.Hospital and from there, he was brought to Porbandar and near the bus stand the accused was found with minor boy Manish and the accused were arrested from the Porbandar bus stand and on completion of the investigation the accused were charge-sheeted. In order to prove the charges levelled against the accused, the present respondent, the Prosecution has examined in all 10 witnesses as under;

PW 1 – Babubhai Devji;
PW 2 – Lalitaben Babulal;
PW 3 – Laxmiben Nathalal;
PW 4 – Dhanuben Ramjibhai;
PW 5 – Manish Babu;
PW 6 – Ramesh Nathalal;
PW 7 – Premji Velji;
PW 8 – Premiben Vejaji;

PW 9 – Balashankar Prabhashanker;
PW 10 – Harjivan Ramji

and has also produced other documents in support of their version to prove the charges.

3. After considering the evidence on record, learned J.M.F.C. has passed the order of conviction mainly relying upon the evidence of P.W.No.5, Manish, who has been examined at Exh.18. However, while considering the appeal, the Sessions Court has not believed the evidence of Child witness P.W.No.5 examined at Exh.18 and has given the benefit of doubt.

4. Learned APP, Shri HL Jani appearing for the appellant has taken me through the oral as well as the documentary evidence on record as well as the observations made by the Sessions Court more particularly in paragraph No. 20 and the subsequent paragraphs. He has contended that the Sessions Court has committed an error by not believing the evidence of P.W.No.5-Manish and the fact that victim was abducted by the accused as mentioned in paragraph 11 of the impugned judgment.

5. I have gone through the evidence of P.W.No.5-Manish and found that the finding arrived at by the Sessions Court is just and proper and trial Court has wrongly relied upon the evidence of P.W.No.5-Manish and thereby convicted the accused. Apart from that the Court below has discussed the evidence of P.W.No.6, Ramesh Nathalal, Exh.19 and has held that custody of the child was given immediately. There was no evidence on record that custody was not given and therefore even the illegal custody is not proved. The trial Court in paragraph 14 has recorded that there are contradiction in the evidence of P.W.No.7-Premji Velji, P.W.No.8-Premiben and P.W.No.10-Harjivan Ramji and therefore the benefit of doubt ought to have been given to the respondent-accused.

6. The principles which would govern and regulate the hearing of appeal by this Court against an order of acquittal passed by the trial Court have been very succinctly explained by the Apex Court in a catena of decisions. This Court has the power to re-consider the whole issue involved in the appeal, re-appraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial Court, if the said findings are

against the weight of the evidence on record or, in other words, perverse. Even in a recent decision of the Apex Court in the case of ***State of Goa v. Sanjay Thakran & anr. reported in (2007) 3 S.C.C. 755***, the Court has reiterated similar principle. In Para-16 of the said decision, the Court has observed as under ;

> "16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with".
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> *[Emphasis supplied]*

7. The Apex Court in a recent decision reported in **2007 AIR SCW 5553** in the case of **State of Uttar Pradesh vs. Ram Veer Singh & Ors.,** in para-9 has held as under:

"9. There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to reappreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. *(see Bhagwan Singh and Ors. v. State of Madhya Pradesh (2002(2)Supreme 567)*. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this court in *Shivaji Sahabrao and Anr. v. State of Maharashtra (AIR 1973 SC 2622); Ramesh Babulal Doshi v. State of Gujarat (1996(4)Supreme 167); Jaswant Singh v. State of Haryana (2000(3)Supreme 320); Raj Kishore Jha v. State of Bihar and Ors. (2003(7) Supreme 152); State of Punjab v. Karnail Singh (2003(5) Supreme 508); State of Punjab v. Pohla Singh and Anr.*

(2003(7) Supreme 17) and V.N. Ratheeshv. State of Kerala (2006(10) SCC 617)."

8. The same principle has been laid down by the Hon'ble Supreme Court in the case of Girja Prasad (Dead) by L.R.s. vs. State of M.P., reported in 2007 AIR SCW 5589, as under;

> "27. *An appeal against acquittal is also an appeal under the Code* and an appellate Court has every power to reappreciate, review and reconsider the evidence as whole before it. It is, no doubt true that there is presumption of innocence in favour of the accused and that presumption is reinforced by an order of acquittal recorded by the trial Court. But that is not the end of the matter. It is for the appellate Court to keep in view the relevant principles of law, to reappreciate and re-weigh the evidence as a whole and come to its own conclusion on such evidence in consonance with the principles of criminal jurisprudence."
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> 28. In Shivaji Sahabrao Bodade v. State of Maharashtra, (1973)2 SCC 793, dealing with a similar situation, a three Judge Bench speaking through V.R. Krishna Iyer, J. Stated:
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> "Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs thro' the web of our law should not be stretched morbidly to embrace every hunch,

hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise, any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light-heartedly as a learned author has sapiently observed, goes much beyond the simple fact that just one guilty persons has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent...." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing enhance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."

29. Recently, *in Chandrappa v. State of Karnataka, (2007)4 SCC 415: JT (2007) 3 SC 316,* after considering the relevant provisions of the old Code (Code of Criminal Procedure, 1898) and the present Code (Code of Criminal Procedure, 1973) and referring to decisions of the Privy Council and of this Court, one of us (C.K. Thakkar, J.) laid down certain general principles regarding powers of Appellate Court in dealing with appeal against an order of acquittal. In para 42 it was observed:

"42.From the above decisions, in our considered view, the following general principles regarding powers of appellate Court

while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, substantial and compelling reasons, good and sufficient grounds, very strong circumstances, distorted conclusions, glaring mistakes, etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of flourishes of language to emphasize the reluctance on an appellate court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

9. In above view of the matter, I am of the opinion that the Sessions Court was completely justified in acquitting the respondent of the offences alleged against him. In my view, the findings recorded by the trial Court are absolutely just and proper

and in recording the said findings, no illegality or infirmity has been committed by it. I am in complete agreement with the findings, ultimate conclusion and the resultant order of acquittal recorded by the trial Court and, hence, find no reasons to interfere with the same. I am not discussing the evidence of each witness in detail in view of the observations made by the Apex Court in the case of ***State of Karnataka Vs. Hemareddy*** reported in ***A.I.R. 1981 S.C. 1417*** wherein it is held as under:

> "... This court has observed in Girija Nandini Devi V. Bigendra Nandini Chaudhary (1967)1 SCR 93: (AIR 1967 SC 1124) that it is not the duty of the appellate court when it agrees with the view of the trial court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

10. For the foregoing reasons, the appeal deserves to be dismissed. The same is dismissed. Office is directed to send the R & P of the case if lying with this Court to the trial Court concerned forthwith.

sompura [K.S. Jhaveri, J.]